No. 04-789

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES *ex rel.* WILLIAM J. GILLIAM,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether certiorari should be granted to review the issues presented by petitioner, where: (a) the court of appeals affirmed the grant of summary judgment in favor of respondent based on petitioner's failure to show basic elements of a cause of action under the False Claims Act, i.e., a false statement that was material to the decision to award a government contract; (b) neither the court of appeals nor the district court reached or discussed in any manner petitioner's first and second questions for review; and (c) petitioner did not raise or present his third and fourth questions for review to either the district court or the court of appeals, and neither court considered the issues.

PARTIES TO THE PROCEEDINGS BELOW

The following individuals or entities were parties to the proceedings in the district court and the court of appeals:

Petitioner
William J. Gilliam ("Gilliam")
Respondent
General Dynamics Corporation ("General Dynamics")

CORPORATE DISCLOSURE STATEMENT

General Dynamics has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

In this action, Gilliam alleged that General Dynamics violated the False Claims Act by making false statements to the United States government to procure the award of a contract for construction of the SSN-23 submarine. After reviewing the extensive, comprehensive factual record, the district court granted summary judgment in favor of General Dynamics, finding that General Dynamics made no false statements to the government and that, in any event, the false statements alleged by Gilliam were not material to any government decision with regard to the SSN-23. The court of appeals, reviewing the district court's decision de novo, affirmed, agreeing with the district court's findings that there was no evidence of false statements and no evidence of materiality. Neither court reached any of the four questions presented by Gilliam to this Court for review. The third and fourth questions presented by Gilliam were not even raised in the district court or the court of appeals.

STATEMENT OF THE CASE

This is a qui tam suit brought pursuant to the False Claims Act, 31 U.S.C. § 3729. Gilliam alleged that General Dynamics lied to the government by saying that its Electric Boat division would go out of business unless it was awarded the contract to build the SSN-23 (later named the "Jimmy Carter") without competitive bidding. Like the district court, the court of appeals held that Gilliam failed to demonstrate two essential elements of his asserted cause of action; specifically, the court held that Gilliam did not demonstrate that General Dynamics made a false statement, and, even if it had, Gilliam did not demonstrate

that the false statements that he alleged were material to the government's decision to award the SSN-23 contract to General Dynamics. (A.26-A.45, R.127-129[1]; *United States ex rel. Gilliam v. General Dynamics Corp.*, 111 Fed. Appx. 143, 144-45, 2004 WL 1542764, at *2 (4th Cir. July 12, 2004) (unpublished) (Pet.'s App. at 15-16).) The court did not reach – or was not even presented with – the questions on which Gilliam now seeks review.

In support of his petition, Gilliam presents this Court with numerous, unsupported allegations that are neither part of, nor supported by, the record below. The record in this matter demonstrates the following facts.

A. The Parties.

General Dynamics is a supplier of sophisticated defense systems, headquartered in Falls Church, Virginia. (A.242, Tab 4.) In 1995, General Dynamics had two main divisions: Land Systems, which designs and builds armored vehicles for the United States Army, the United States Marine Corps, and international customers; and Electric Boat. (*Id.*)

Electric Boat is in the business of designing and constructing nuclear submarines for its customer, the United States Navy. (*Id.*; A.437, Tab 7 ¶ 2.) As recognized by the Navy, Electric Boat is the United States' preeminent submarine designer and premier resource for submarine

[1] Citations are to the joint appendix that accompanied the parties' briefs in the court of appeals. The district court set forth its findings in the Transcript of Motion Hearing Before the Honorable C. Weston Houck, included at A.28-A.44.

design and construction technology. (A.290, Tab 5 at 154; A.549, Tab 13 at 123; A.652, Tab 19 at 56.)

B. The Seawolf Submarine Program and the End of the Cold War.

In 1982, the Navy began development of the Seawolf class of nuclear attack submarines. *See Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp.*, 960 F.2d 386, 388 (4th Cir. 1992). The Seawolf was designed to achieve unprecedented levels of technical performance and war-fighting capability. *Id.* The Navy originally planned to construct 29 Seawolf class submarines. (A.558, Tab 13 at 167.) In 1989, Electric Boat competed against Newport News Shipbuilding ("NNS") for the contract to build the first Seawolf class submarine, the SSN-21.[2] *Newport News*, 960 F.2d at 389. The Navy awarded the contract to Electric Boat because it was the low cost bidder. (*Id.*; A.591-A.592, Tab 18 at 66-67.)

In 1989, as Electric Boat built the first Seawolf (the SSN-21), the Berlin Wall fell, and, in 1991, the Soviet Union dissolved, ending the Cold War. *Newport News*, 960 F.2d at 389. As a result, in the face of significant defense budget reductions, the Navy had to reformulate its submarine procurement plans. *Id.* The Seawolf program was

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[2] There are only two shipyards in the United States that are capable of manufacturing nuclear submarines: Electric Boat, headquartered in Groton, Connecticut, and Newport New Shipbuilding, headquartered in Newport News, Virginia. Electric Boat and Newport News have been the United States' only builders of nuclear submarines since the late 1970s. (A.564-A.565, Tab 18 at 12-13.) Newport News is also the United States' sole manufacturer of nuclear-powered aircraft carriers. (A.526, Tab 13 at 35.)

reduced from 29 ships to three ships. (A.331, Tab 5 at 195.) In 1991, instead of procuring two Seawolf class submarines as planned, the Navy put out only one contract for bid, the SSN-22. *Newport News*, 960 F.2d at 389. In the competition with NNS, Electric Boat again was the low cost bidder; the government awarded the SSN-22 contract to Electric Boat in May 1991. (*Id.* at 390-91; A.592, Tab 18 at 67.)

In January 1992, the Bush administration canceled the remaining Seawolf program and rescinded the prior authorizations for the SSN-22 and SSN-23. (*See* A.525, Tab 13 at 33.) In March 1992, then-presidential candidate William J. Clinton pledged to the employees at Electric Boat's principal facility in Groton, Connecticut, that both the SSN-22 and the SSN-23 would be built by Electric Boat if he were elected. (A.190, Tab 11; A.259, Tab 5 at 108.) In May 1992, Congress overrode the rescission and re-authorized the SSN-22. (A.738, Tab 23 at 51.) Congress also allocated $540 million to support the SSN-23, if authorized, or other actions that might help to preserve the industrial base for nuclear submarine construction. (*Id.*; *see* A.280, Tab 5 at 144; A.392, Tab 27 at 000102.)

Even with the re-authorization of the SSN-22, the number of submarines to be built decreased dramatically, threatening a lengthy gap between the last then-authorized submarine (the SSN-22) in 1991 and the New Attack Submarine, which was not scheduled to begin production until 1998. (A.266, Tab 5 at 130.)

This seven-year gap in new submarine authorizations presented a marked contrast to prior construction levels. In the 1980s, Congress authorized construction of three to four nuclear attack submarines (the Los Angeles/688 class

and the Seawolf class) per year and one nuclear ballistic missile submarine (the Trident class) per year. (*Id.*; *see also* A.480, Tab 16 at 35.) Between 1992 and 1994, government and independent private "think tanks" (e.g., the RAND Corporation) conducted numerous comprehensive studies about the effect of the reduction and the resultant production gap on the nuclear submarine industrial base. (A.279, A.294, Tab 5 at 143, 158; A.574, A.577-A.580, A.589-A.590, Tab 18 at 23, 26-29, 64-65; A.536-A.537, Tab 13 at 78-79.)

In August 1992, as part of one of its studies, the Navy sent Electric Boat a questionnaire (the "1992 questionnaire"). (A.199-A.200, Tab 1; A.529-A.531, Tab 13 at 46-48.) One area of inquiry related to Electric Boat's commercial business. (A.208, Tab 1 at I-10.) Electric Boat accurately responded that it was exploring commercial business, that commercial work accounted for approximately 1% of its current sales, and that it forecasted this work to account for 1% or less of its total future sales, with its remaining business coming from the Navy. (A.206-A.210, Tab 1 at I-8-I-10, I-17; A.424-A.426, Tab 9 ¶¶ 5-8.) It further responded that "[a]dditional new [submarine] construction work is needed however to bridge [the submarine construction] gap between now and 1998." (A.204, Tab 1 at I-6.)

In the Spring of 1993, shortly after the Clinton administration took office, the Department of Defense ("DoD") initiated a Bottom Up Review ("BUR") of major weapons programs. Topics of the review included whether to maintain two nuclear capable shipyards and how to maintain the nuclear submarine industrial base. (A.571-A.572, A.574-A.575, Tab 18 at 19-20, 23-24.) In the Fall of 1993, the BUR concluded that Electric Boat should construct the

SSN-23, in part to preserve the submarine industrial base and bridge the projected gap in submarine production. (A.588-A.589, Tab 18 at 63-64; A.538-A.539, Tab 13 at 99-100.) Other independent and government studies reached the same conclusion. (A.279, Tab 5 at 143; A.586 A.589, Tab 18 at 61-64.)

In the Spring of 1994, Nora Slatkin, Assistant Secretary of the Navy for Research, Development and Acquisition, approved the sole-source award of the SSN-23 contract to Electric Boat. (A.402, Tab 27 at 000112). Ms. Slatkin offered several justifications for her decision to award the contract to Electric Boat without competitive bidding: to bridge the gap in nuclear submarine production; to ensure the continued viability of the submarine industrial base; to protect the nation's ability to build nuclear submarines in the future; and to prevent the loss of Electric Boat's nuclear submarine production skills. (A.399, Tab 27 at 000109.)

Even if there had been competitive bidding, Electric Boat would have been awarded the contract; its only potential competitor, NNS, so acknowledged. In March 1991, Edward Campbell, then president and CEO of NNS, testified before Congress: "[A]lthough we could theoretically bid on the third or fourth Seawolf, realistically Newport News would be too far behind Electric Boat on the learning curve to be able to compete." (A.186, Tab 28 at 586; *see also* A.187, Tab 28 at 592; A.591, Tab 18 at 66.) At a Congressional hearing in April 1995, NNS reiterated that it could not compete for the SSN-23. William Fricks, then president and COO of NNS, when asked whether Electric Boat would be awarded the third Seawolf stated: "Certainly if it is approved, they will. We [NNS] are not in

the Seawolf business today. They [Electric Boat] have built two." (A.253, Tab 29.)

C. Electric Boat's Commercial Opportunities (or Lack Thereof).

At the same time that the Navy was re-formulating its submarine plans in light of shrinking defense budgets, Electric Boat was exploring its options, which included the pursuit of potential commercial ventures. Electric Boat assigned several business unit managers to investigate commercial opportunities. (A.437-A.438, Tab 7 ¶ 3; A.440, Tab 8 ¶ 2; *see also* A.729, A.733, Tab 23 at 4, 27.) Through these and other efforts, Electric Boat was able to secure two small commercial contracts: one for approximately $23 million to build waste digester tanks and one for approximately $1.7 million to build storage racks for spent nuclear fuel rods. (A.438, Tab 7 ¶ 3.) Both contracts proved unprofitable. (*Id.*; A.441, Tab 8 ¶ 4; A.705-A.706, Tab 20 at 77-78; A.734, Tab 23 at 34.) Other commercial opportunities that Electric Boat considered, such as liquefied natural gas ("LNG") spheres, barge mounted power plants ("BMPPs") and ocean thermal energy conversion ("OTEC") failed to result in any work. Despite Electric Boat's efforts, commercial work continued to constitute less than 1% of Electric Boat's revenues. (A.456-A.457, Tab 14 at 90-91; A.425, Tab 9 ¶ 7; A.438, Tab 7 ¶ 5.)

In the Fall of 1993, Electric Boat decided to cease its efforts to develop commercial business and to focus solely on nuclear submarine design and production, its core competency for four decades. (A.227-A.228, Tab 3 at 6-7; A.438, Tab 7 ¶ 4; A.440-A.441, Tab 8 ¶ 3; A.237, R.50, Ex. 4 at 6; *see* A.328, Tab 5 at 192; A.435, R.43, App. B ¶ 20.) It

planned to survive at a low level of submarine work – as little as ½ submarine per year. (A.227, Tab 3 at 6; A.341, Tab 5 at 205; A.720, Tab 22 at 25.)

Electric Boat's decision to exit commercial work was well publicized. The Navy was aware that, because Electric Boat had "lost their pants" on its commercial forays, it had given up on commercial activity. (A.585, A.594-A.595, Tab 18 at 58, 72-73.)

The government, including Congress, was directly and unambiguously told precisely that. On December 8, 1993, Electric Boat met with officials from the General Accounting Office ("GAO"), commonly called the "investigative arm of Congress" or the "congressional watchdog," the Navy Supervisor of Shipbuilding ("SupShip"), and the Naval Reactors Representative Office ("NRRO"). It informed them that Electric Boat had ended "its pursuit of 'market extension' opportunities" and had decided to "focus[ ] on design and construction of nuclear submarines." (A.170-A.171, Tab 6 ¶¶ 3-4; A.175, Tab 6 at 2587.)

In its 1993 Annual Report, General Dynamics stated that Electric Boat had decided to "focus exclusively on building submarines." (A.227, Tab 3 at 6.) The Navy reviewed General Dynamics' annual reports and was well-aware of this decision. (A.533-A.534, Tab 13 at 68-69; A.581-A.582, Tab 18 at 45-47.) Newspapers contained articles about it. (A.215-A.217; A.231, Tab 12; A.245, R.126, Ex. D.) Moreover, the Navy was keenly aware of what was taking place at Electric Boat's facilities, including its decision to discontinue commercial work, because hundreds of Navy and other government officials are stationed at Electric Boat, interact daily with Electric Boat personnel, and have access to all areas of Electric Boat's

facilities. (A.474-A.479, A.481-A.484, Tab 16 at 14-16, 31-33, 36-39; A.580, A.583-A.584, Tab 18 at 29, 52-53; A.519-A.520, Tab 13 at 16-17.)

In the Fall of 1993, Electric Boat began to implement its decision to exit commercial work. Electric Boat disbanded its commercial business units and put its Charleston, South Carolina assets relating to LNG spheres and BMPPs up for sale in an entity called Marine Energy Systems Corporation ("MESC"). (A.438, Tab 7 ¶ 4; A.440-A.442, Tab 8 ¶¶ 3, 6.) Goldman Sachs distributed a so-called "offering memorandum," as referred to by Gilliam, for the purpose of selling MESC. It was entitled "Opportunity in LNG Containment Systems Fabrication," stated that "General Dynamics is seeking a purchaser for its liquefied natural gas ('LNG') containment systems business," (A.235, R.50, Ex. 4 at 4), and referred to BMPPs as "Additional Opportunities." (A.237, R.50 Ex. 4 at 6; *see* A.233, R.50, Ex. 4 at 2.) It went on to state: "General Dynamics has elected to focus its resources on the management of its core defense businesses, and believes that MESC can be most successful in a corporation dedicated to the commercial sector." (A.237, R.50, Ex. 4 at 6.)

Thus, if the hundreds of millions of dollars of "potential revenue" from these LNG and BMPP "opportunities" referred to in the memorandum were going to be realized, they were not going to be realized by Electric Boat; rather, they might be realized by the buyer of MESC. That buyer was Gilliam. In December 1994, Gilliam's company bought MESC from General Dynamics for $12 million. (R.73 ¶ 2;

A.438, Tab 7 ¶ 4; A.451, Tab 14 at 23.)[3] Electric Boat wound down other attempts to develop commercial work by the end of 1993. All projects relating to such efforts were concluded by the end of 1994. (A.440-A.442, Tab 8 ¶¶ 3-7; A.438, Tab 7 ¶ 4.)

D. The 1995 Congressional Hearings.

In 1995, Congress held a series of hearings to address (1) appropriation of funds for the construction of the SSN-23 by Electric Boat and (2) the Navy's strategy for the procurement of the New Attack Submarine class (the Virginia class), which would succeed the Seawolf class of submarines. (A.254-A.255, Tab 5; A.246-A.247, Tab 29; A.249-A.250, Tab 30.) The Navy supported the appropriation of the funds for the construction of the SSN-23 by Electric Boat for two reasons. First, the construction of the SSN-23 by Electric Boat would preserve the nuclear submarine industrial base. Second, there was a military need for the SSN-23 in light of a new Russian threat. (A.255-A.256, A.263, A.266, A.275-A.279, Tab 5 at 104-05, 127, 130, 139-143.) With respect to preserving the industrial base, Assistant Navy Secretary Slatkin testified: "[T]his decision [to procure the SSN-23] does a number of very good things for us. It maintains two nuclear capable shipbuilders, preserving vital national resources. It also provides a submarine for the money. [It] is not just any submarine, but one whose capabilities are needed today. . . ." (A.266, Tab 5 at 130.) Ms. Slatkin made clear that the Navy and other government and independent agencies

[3] In March 1997, MESC filed for bankruptcy protection. (A.453, Tab 14 at 27.)

had done much detailed analysis, conducted numerous studies, had considered all possible alternatives, and had concluded that the SSN-23 was essential for the preservation of the submarine industrial base. (A.279-A.280, A.294, Tab 5 at 143-144, 158.)

James E. Turner, Jr., president of Electric Boat, also testified at the 1995 hearings. He stated: A "thorough assessment of market opportunities was conducted [by Electric Boat] covering submarine design and construction, overhaul and repair, and commercial business. As a result of this assessment, a decision was made to focus on continued submarine development and construction." (A.341-A.342, Tab 5 at 205-06; A.248, A.252, Tab 30.) No questions were asked of Mr. Turner at any of the hearings concerning Electric Boat's possible commercial work.

In December 1995, following the hearings, Congress voted to appropriate funds for the construction of the SSN-23 as part of the fiscal year 1996 DoD appropriation. (*See* Dep't of Def. Appropriations Act, 1996, Pub. L. No. 104-61, Tit. III, 109 Stat. 636, 645 (1995).) In June 1996, the Navy and Electric Boat entered into the contract for the production of the SSN-23. (A.408, R.126, Ex. B.) Electric Boat delivered the SSN-23 in 2004. (A.489-A.490, Tab 16 at 75-76.)

E. The Complaint and the District Court's Judgment.

On May 7, 1999, Gilliam initiated this action by filing a complaint alleging a violation of the False Claims Act. Gilliam alleged that during the "bottom up review" and during the 1995 Congressional hearings, General Dynamics provided false information to the effect that, without submarine construction orders, Electric Boat's shipbuilding

capability would not survive and the division would go out of business. (Compl. ¶¶ 5-7.) Gilliam alleged that General Dynamics failed to disclose commercial opportunities that would have sustained its workforce. (Compl. ¶ 8.) The United States declined to intervene in the suit.

On October 15, 2002, after extensive discovery and the development of a comprehensive factual record, the district court granted summary judgment in favor of General Dynamics. (A.26-A.45, R.127-129.) The court held that there was no evidence of any false statements and, in any event, the alleged false statements were not material to the government's decision to award the SSN-23 contract to Electric Boat. (*Id.*)

F. The Appeal.

On July 18, 2003, Gilliam filed a timely notice of appeal. On appeal, Gilliam similarly contended that Congress' decision to award the SSN-23 to General Dynamics without competitive bidding was "predicated on false statements." Gilliam argued that General Dynamics made statements "to the effect that if it had to compete for the SSN-23, its Electric Boat division would go out of business." Further, Gilliam contended that General Dynamics made representations to Congress about commercial prospects that were "inconsistent with other representations made to shareholders, with confidential information shared with Mr. Gilliam, and with other evidence in the record." (Appellant's Brief at 8.)

The court of appeals affirmed the district court's order granting summary judgment. (Pet.'s App. at 14.) The court of appeals held that, assuming Gilliam's theory was actionable under the False Claims Act, there was no

genuine issue of material fact on the false statement or materiality elements. (*Id.* at 15.) The court found "no evidence to support Gilliam's argument that Electric Boat told the government it would shut down if it was merely forced to submit a bid for the SSN-23." (*Id.* at 16.) The court cited Mr. Turner's testimony to Congress that "[p]remature competition will drive up costs unnecessarily and risk permanent loss of Electric Boat." The court pointed out that this statement referred only to competition for the New Attack Submarine (the Virginia class), not the SSN-23 (a Seawolf class submarine). (*Id.*) The court of appeals concluded that a factfinder "simply could not construe Turner's statement as saying anything false about competition for the SSN-23." (*Id.*)

The court of appeals also rejected Gilliam's alternative contention that Electric Boat should have disclosed that it chose not to pursue commercial opportunities. The court held that "[a]gain, there is no genuine issue of material fact on the false statement element because Electric Boat did disclose both to Congress and the Navy that it considered commercial opportunities, but had abandoned them." (*Id.*) Further, in any event, the court found no evidence that any lack of disclosure was material to the decision to sole source the SSN-23 to Electric Boat: "Assuming Electric Boat's foregone business opportunities would have been as lucrative as Gilliam claims, they at most indicate that Electric Boat could have survived as a commercial entity." (*Id.*) The government, however, was interested in maintaining nuclear shipyard capacity, and no evidence indicated that commercial opportunities would have preserved Electric Boat's capacity to build nuclear ships. "Thus Electric Boat's failure to disclose its foregone commercial opportunities could not have been material to the

decision to sole-source the SSN-23." (*Id.*) The court of appeals did not reach General Dynamics' alternative defense that, even if Mr. Turner made false statements in his congressional testimony, the statements were protected by the First Amendment and, therefore, not actionable.

Gilliam's petition for rehearing and suggestion for rehearing en banc were denied with no judge voting to grant rehearing.

REASONS FOR DENYING THE WRIT

The lower courts' decisions were based solely on factual findings and the application of those findings to well-settled law. The questions presented by Gilliam to this Court did not form the basis for any ruling of the district court or the court of appeals; they either were unnecessary to the courts' decisions and thus not reached, or they were not even presented. Accordingly, Gilliam has not and cannot demonstrate that the courts entered any decision that conflicts with the decision of another court, have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers, or have decided an important question of federal law that should be settled by this Court. *See* S. Ct. R. 10. The writ, therefore, should be denied.

I. THE FIRST AND SECOND QUESTIONS DO NOT WARRANT THIS COURT'S REVIEW.

The district court and the court of appeals concluded that there were no false statements and that the alleged false statements were immaterial. Thus, neither court considered General Dynamics' alternative defense that Mr.

Turner's testimony to Congress was not actionable because that testimony was entitled to *Noerr-Pennington* First Amendment immunity. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). Because this constitutional issue was not implicated by the decision of either court, it is not appropriate for review by this Court.

A. Gillaim Has Not Demonstrated That There Is Any Disagreement Among Lower Federal Courts.

Gilliam states that General Dynamics "has succeeded in creating First Amendment immunity under the False Claims Act to provide 'opinion testimony' to Congress during hearings." (Pet. at 17.) He argues that certiorari should be granted to "correct" this inconsistency with the *Noerr-Pennington* line of cases. (*Id.*)

Gilliam misrepresents the decisions below. The court of appeals, as well as the district court, based its summary judgment ruling on petitioner's failure to produce evidence in support of the basic elements of his asserted claim. The elements of a False Claims Act claim include: (1) "a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999). The lower courts found no genuine issue of material fact on the first or third elements, i.e., false statement or materiality. The courts, therefore, did not need to reach – and did not reach – General Dynamics' defenses, such as whether Mr. Turner's testimony was entitled to First Amendment

protection or whether Congress' decision to appropriate the funds to construct the SSN-23 is a nonjusticiable question. The courts' opinions, therefore, cannot possibly conflict with any cases addressing *Noerr-Pennington* First Amendment immunity.

Moreover, Gilliam has not only failed to demonstrate a conflict with any other decision, he also has failed to point to any disagreement among other courts on the questions presented. Gilliam has cited no False Claims Act cases addressing an alleged misrepresentation to Congress – let alone any cases that disagree on the immunity of such testimony. In fact, although no court directly has addressed the issue, authority consistently suggests that such testimony would fall within *Noerr-Pennington* boundaries. *Cf. IGEN Int'l, Inc. v. Roche Diagnostics GMBH*, 335 F.3d 303, 310 (4th Cir. 2003) (The "Noerr-Pennington doctrine grants First Amendment immunity to those who engage in petitioning activity" and "immunizes [such] activity from collateral attack."); *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) ("[P]arties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others."); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998) ("The Supreme Court has long recognized that for the Petition Clause to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way.").

Gilliam is asking this Court to articulate new constitutional law on a clean slate, without the benefit of the reasoning of any prior decision. There is no pressing need for the Court to consider such an extraordinary request at

this juncture. *See, e.g.*, *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (dismissing writ as improvidently granted because of lack of circuit court conflict); *accord Wisconsin Elec. Co. v. Don Dumore Co.*, 282 U.S. 813, 813 (1931); *Sanchez v. Borras*, 283 U.S. 798, 798 (1931); *Keller v. Adams-Campbell Co.*, 264 U.S. 314, 319-20 (1924).

B. Gilliam Seeks to Have This Court Review and Revisit Factual Findings.

Gilliam asks this Court to declare a new constitutional rule based on a set of factual assertions that he did not prove. That is, he wants this Court to revisit the lower courts' factual findings as to whether any "false" or "misleading" testimony was offered in the first place, and, assuming this Court agrees with his assertions, make a constitutional determination that those statements are not protected speech. (Pet. at 13-17.)

For instance, challenging the court's factual determinations, Gilliam argues that "the court of appeals erroneously viewed Mr. Turner's May 1995 statements as being truthful." (Pet. at 14.) Gilliam asserts that Mr. Turner told him that General Dynamics' commercial businesses "were essential to its long term success," that Mr. Turner made inconsistent statements to the Senate, and, therefore, the statements to the Senate must have been "false and misleading." (*Id.* at 13-15.) Gilliam asks this Court then to reject General Dynamics' anticipated response that such statements are protected by the First Amendment. (*Id.* at 15.)

However, this Court does not grant a writ of certiorari to review evidence and discuss specific facts. *See Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ of certiorari as improvidently granted where only issue

raised below was primarily factual); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Nor does this Court issue sweeping constitutional declarations merely to relieve a particular litigant of the adverse consequences of a single lower court determination. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("A-federal question . . . may present an intellectually interesting and solid problem. But his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . This is especially true where the issues involved reach constitutional dimensions.").

Gilliam seeks to use General Dynamics' alternative *Noerr-Pennington* defense – a defense never reached – as a hook to gain a third opportunity to argue his "false statement" evidence. That, however, is not a basis for review by this Court.

II. GILLIAM'S THIRD QUESTION DOES NOT WARRANT THIS COURT'S REVIEW.

Gilliam's third question – whether the court of appeals' decision affirming summary judgment represents "an important conflict" with the Fourth Circuit's decision in *Newport News Shipbuilding v. General Dynamics Corp.*, 960 F.2d 386 (4th Cir. 1992), "calling for the exercise of this Court's supervisory power" – does not merit consideration by this Court. Gilliam has not demonstrated that the court of appeals decided any issue similar to that decided in *Newport News*, that he presented any such argument in either of the lower courts, or that the issue is even relevant to his asserted cause of action. Indeed,

Newport News was authored by one of the Fourth Circuit judges (Judge Niemeyer) who presided over the panel in this case and joined in its unanimous decision. Surely, Judge Niemeyer understood the *Newport News* decision that he authored.

A. The Court of Appeals' Decision Does Not Conflict with the *Newport News* Decision.

Gilliam has not demonstrated that the court of appeals' decision conflicts with the decision entered in *Newport News* – or even that *Newport News* involved similar issues. *Newport News* involved the government's procurement decision for the SSN-22 submarine; this case involves Gilliam's claims that General Dynamics made false statements to Congress. *Newport News* was a bid challenge case; this is a False Claims Act case. The two decisions did not involve overlapping – let alone conflicting – rulings.

In *Newport News*, the disappointed bidder for the SSN-22 submarine contract, Newport News, brought suit challenging the Navy's decision to award the contract to General Dynamics' Electric Boat division. The district court granted an injunction and directed the parties to resubmit bids. *Newport News*, 960 F.2d at 391. The Navy and General Dynamics appealed. On appeal, the court recognized as an initial matter that, because "awarding Navy contracts for the construction of nuclear submarines must remain the responsibility of the executive branch," the judiciary is limited to examining (1) whether the Navy complied with the law in awarding the contract and (2) whether its conduct in doing so was rational. *Id.* at 388 ("[I]t is well-established that a disappointed bidder bears

the heavy burden of establishing in court that 'the decision by the government agency either had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations.' "). The court reviewed the congressional authorization for the SSN-22 contract, as well as the Navy's solicitation and award of the contract to Electric Boat. *Id.* at 392-95. Based on the evidence presented, the court rejected the district court's findings and Newport News' contentions that the Navy failed to consider industrial mobilization in its procurement decision and violated its solicitation by making an award based only on price. To the contrary, the court found that the Navy considered the importance of industrial mobilization throughout the process of awarding the SSN-22 contract to Electric Boat, complied with congressional directives, and, in the face of shrinking appropriations, acted rationally. *Id.*

None of these issues was presented in this case. Thus, the court of appeals' decision in this case does not conflict with *Newport News*.

B. Gilliam Did Not Challenge the Government's Procurement Process in the District Court or the Court of Appeals.

Gilliam asks for review by this Court "in order to ensure uniformity in the Fourth Circuit's decisions relative to Seawolf procurement." (Pet. at 22.) Gilliam, however, failed to raise any claim below about the government's procurement process, and neither the district court nor the court of appeals considered the issue. This is fatal to Gilliam's third question. This Court will not review a question not raised or passed on by the lower courts. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ of

certiorari as improvidently granted where questions presented by petitioner were not raised nor passed upon below; "We cannot decide issues raised for the first time here."); *accord United States v. Williams*, 504 U.S. 36, 41 (1992); *Husty v. United States*, 282 U.S. 694, 701-02 (1931). Thus, for this alternative reason, this question is not appropriate for review by this Court.

III. GILLIAM'S FOURTH QUESTION DOES NOT WARRANT THIS COURT'S REVIEW.

With respect to the fourth question that Gilliam presents for review, Gilliam asserts that the courts below "reject[ed] false certification liability under the False Claims Act" and that this represents an "important split of authority within the Circuits calling for the exercise of this Court's supervisory powers." (Pet. at i-ii, 29-30.) However, Gilliam never argued his false certification liability theory in either the district court or the court of appeals and, consequently, neither court considered the issue.

Thus, Gilliam's newly-asserted false certification liability theory rests on factual as well as legal assertions that the courts below did not consider or weigh. For instance, Gilliam claims that, assuming the district court and the court of appeals were correct in finding that James Turner's 1995 Senate testimony was true, General Dynamics' 1992 SEC filings "could not have complied with SEC reporting requirements." (Pet. at 26.) Gilliam asserts that General Dynamics contemplated winding up its business and distributing all of the funds to shareholders prior to the DoD decision to fund the SSN-23. He asserts that General Dynamics "would have closed down its Electric Boat Division absent approval of funding" and

"never disclosed this fact to its shareholders or to the SEC" by filing a Form 8-K. (*Id.*) According to Gilliam, this alleged securities violation breached an "affirmative covenant" in "all of [General Dynamics'] government contracts." (*Id.* at 28.) Gilliam asserts that this Court should exercise its "supervisory powers" to find false certification liability and thereby "protect the Congressional Intent of the False Claims Act." (*Id.* at 30.)

Gilliam, however, never asserted these alleged facts or presented this theory to either of the courts below. Thus, General Dynamics did not address them to demonstrate their absurdity, and neither the district court nor the court of appeals considered or made any findings about them. This Court does not sit to parse new facts, nor does it review questions presented on an insufficient record. *See Mishkin v. New York*, 383 U.S. 502, 512-13 (1966) (dismissing writ as improvidently granted where questions tendered by claim were "not presented by the record with sufficient clarity to require or justify their decision"); *Needelman v. United States*, 362 U.S. 600, 600 (1960) (dismissing writ as improvidently granted where the record did not adequately present the questions tendered).

In any event, the evidence showed that General Dynamics did not make any misrepresentations to its shareholders or to the SEC. (*See, e.g.*, A.35-A.44.) Moreover, Gilliam provides no authority for his assertion that any such misrepresentations to shareholders or the SEC would constitute a violation of the False Claims Act.

Accordingly, the writ as to Gilliam's fourth question should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied in its entirety.

Respectfully submitted,

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